DOCUMENT RESUME

ED 301 204 IR 052 547

TITLE	Your Right To Know. New York State's Open Government Laws.
INSTITUTION	New York State Committee on Open Government, Albany.
REPORT NO	384006-006
PUB DATE	Jan 87
NOTE	18p.
AVAILABLE FROM	Committee on Open Government, New York State Department of State, 162 Washington Avenue, Albany, NY 12231 (free while supply lasts).
PUB TYPE	Guides - General (050) -- Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01/PC01 Plus Postage.
DESCRIPTORS	*Access to Information; *Confidential Records; Courts; Disclosure; *Freedom of Information; Government Role; *Information Dissemination; *Privacy; State Agencies; State Legislation
IDENTIFIERS	New York; *Open Meetings; *Right Of Access

ABSTRACT

This brochure first discusses the make-up of the Committee on Open Government and its responsibility for overseeing the implementation of two laws: the Freedom of Information Law (Public Officers Law, sections 84-90), which governs rights of access to government records; and the Open Meetings Law (Public Officers Law, sections 100-111), which concerns the conduct of meetings of public bodies and the right to attend those meetings. An explanation is given of the Freedom of Information Law, what records are accessible, how to obtain records, and access to court records; sample request and appeal letters are provided. Discussion of the Open Meetings Law includes an explanation of what a "meeting" is, what is covered by the law, notice of meetings, closed meetings, minutes of meetings, enforcement of the law, the site of meetings, and exemptions from the law. (CGD)

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Your right to know

New York State's

Open Government Laws

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Committee on Open Government

- **Freedom of Information Law**
- **Open Meetings Law**
- **Personal Privacy Protection Law**

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You should know—a 12-page brochure regarding the Personal Privacy Protection Law is also available free of charge from the Committee on Open Government.

The Committee

The Committee on Open Government is responsible for overseeing the implementation of the Freedom of Information Law (Public Officers Law, sections 84-90) and the Open Meetings Law (Public Officers Law, sections 100-111). The Freedom of Information Law governs rights of access to government records, while the Open Meetings Law concerns the conduct of meetings of public bodies and the right to attend those meetings. The committee also administers the Personal Privacy Protection Law.

The committee is composed of 11 members, 5 from government and 6 from the public. The five government members are the Lieutenant Governor, the Secretary of State, whose office acts as secretariat for the committee, the Commissioner of General Services, the Director of the Budget, and one elected local government official appointed by the Governor. Of the six public members, at least two must be or have been representatives of the news media.

The Freedom of Information Law directs the committee to furnish advice to agencies, the public and the news media, issue regulations and report its observations and recommendations to the Governor and the Legislature annually. Similarly, under the Open Meetings Law, the committee issues advisory opinions, reviews the operation of the law and reports its findings and recommendations annually to the Legislature.

When questions arise under either the Freedom of Information Law or the Open Meetings Law, the committee can provide written or oral advice and mediate in controversies in which rights may be unclear. During its first five years, more than 1,500 written advisory opinions were prepared by the committee at the request of government, the public and the news media. In addition, several thousand oral opinions have been provided by telephone.

If you need advice regarding either the Freedom of Information Law or the Open Meetings Law, feel free to write to:

Committee on Open Government
NYS Department of State
162 Washington Avenue
Albany, NY 12231

or call (518) 474-2518.

The Freedom of Information Law

The Freedom of Information Law, effective January 1, 1978, reaffirms your right to know how your government operates. It provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker. The law preserves the Committee on Open Government, which was created by enactment of the original Freedom of Information Law in 1974.

Scope of the Law

The law defines "agency" to include all units of state and local government in New York State, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of local government in the state (section 86(3)).

The term "agency" does not include the State Legislature or the courts. As such, for purposes of clarity, "agency" will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts, both of which will be discussed later.

What is a Record?

The law defines "record" as "any information kept, held, filed, produced or reproduced by, with or for an agency or the State Legislature, in any physical form whatsoever..." (section 86(4)). Thus it is clear that items such as tape recordings, microfilm and computer discs fall within the definition of "record."

Accessible Records

The original statute granted rights of access to nine specified categories of records to the exclusion of all others. Therefore, unless a record conformed to one of the categories of accessible records, it was presumed deniable.

The new law, reversing that presumption, states that all records are accessible, except records or portions of records that fall within one of nine categories of deniable records (section 87(2)).

Deniable records include records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) would if disclosed result in an unwarranted invasion of personal privacy;

(c) would if disclosed impair present or imminent contract awards or collective bargaining negotiations;

(d) are trade secrets or are maintained for the regulation of commercial enterprise and if disclosed would cause substantial injury to the subject enterprise;

(e) are compiled for law enforcement purposes and which if disclosed would:

i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relative to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) would if disclosed endanger the life or safety of any person;

(g) are inter-agency or intra-agency communications, except to the extent that such materials consist of:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations;

(h) are examination questions or answers that are requested prior to the final administration of such questions; or

(i) are computer access codes.

The categories of deniable records are generally directed to the effects of disclosure. They are based in great measure upon the notion that disclosure would in some instances "impair," "cause substantial injury," "interfere," "deprive," "endanger," etc. This represents a significant change from the thrust of the original enactment.

One category of deniable records that does not deal directly with the effects of disclosure is exception (g), which deals with inter-agency and intra-agency materials. The intent of the exception is twofold. Memoranda or letters transmitted from an official of one agency to an official of another or between officials within an agency may be denied, so long as the communications (or portions thereof) are advisory in nature and do not contain information upon which the agency relies in carrying out its duties. For example, an

opinion prepared by staff which may be rejected or accepted by the head of an agency need not be made available. However, the facts, policies and determinations upon which an agency relies in carrying out its duties should be made available.

There are also special provisions in the law regarding the protection of trade secrets. Those provisions pertain only to state agencies and enable a person submitting records to state agencies to request that records be kept separate and apart from all other agency records on the ground that they constitute trade secrets. In addition, when a request is made for records characterized as trade secrets, the submitter of such records is given notice and an opportunity to justify a claim that the records would if disclosed result in substantial injury to his or her competitive position. A member of the public requesting records characterized as trade secrets or a state agency at any time may challenge a claim that records constitute trade secrets.

Generally, the law provides access to existing records. Therefore, an agency need not create a record in response to a request. Nevertheless, each agency must compile the following records (section 87(3)):

(a) a record of the final vote of each member in every agency proceeding in which the member votes;

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

(c) a reasonably detailed current list by subject matter of all records in possession of an agency, whether or not the records are accessible.

Protection of Privacy

One of the exceptions to rights of access, referred to earlier, states that records may be withheld when disclosure would result in "an unwarranted invasion of personal privacy" (section 87(2)(b)).

Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when upon representing reasonable proof of identity, a person seeks access to records pertaining to him or her.

How to Obtain Records

Subject Matter List

As noted earlier, each agency must maintain a "subject matter list." The list is not a compilation of every record an agency has in its possession, but rather is a list of the subjects or file categories under which records are kept. It must make reference to all records in possession of an agency, whether or not the records are available. You have a right to know the kinds of records agencies maintain.

The subject matter list must be compiled in sufficient detail to permit you to identify the file category of the records sought.

Regulations

Each agency must adopt standards based upon general regulations issued by the committee. These procedures describe how you can inspect and copy records. The committee will provide a copy of its regulations on request.

Designation of Records Access Officer

Under the regulations, a records access officer (or officers) must be appointed to coordinate an agency's response to public requests for records.

The records access officer is responsible for keeping the subject matter list up to date, assisting you in identifying records sought, making the records promptly available or denying access, providing copies of records or permitting you to make copies, certifying that a copy is a true copy and, if the records cannot be found, certifying either that the agency does not have possession of the requested records or that the agency does have the records, but they cannot be found after diligent search.

The regulations also state that the public shall continue to have access to records through officials who have been authorized previously to make information available.

Requests for Records

An agency may ask you to make your request in writing. The new law merely requires you to "reasonably describe" the record in which you are interested (section 89(3)). The responsibility of identifying and locating records sought rests to an extent upon the agency. However, if possible, you should supply dates, titles, file designations, or any other information that will help to find requested records.

Within five business days of the receipt of a written request for a record reasonably described, the agency must make the record available, deny access in writing giving the reasons for denial, or furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied.

Fees

Copies of records must be made available on request. Except when a different fee is prescribed by statute, an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to 9 by 14 inches (section 87(1)(b)(iii)). Fees for copies of other records may be charged based upon the actual cost of reproduction.

If an agency has no photocopying equipment, a transcript of records must be made on request. However, you may be charged for the clerical time involved.

Denial of Access and Appeal

A denial of access must be in writing, stating the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to hear appeals by the head or governing body of the agency. You may appeal within 30 days of a denial.

Upon receipt of the appeal, the agency head, governing body or appeals officer has 10 business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of all appeals and the determinations thereon must be sent by the agency to the Committee on Open Government (section 89(4)(a)). This requirement will enable the committee to monitor compliance with law and intercede when a denial of access may be improper.

You may seek judicial review of a final agency denial by means of a proceeding initiated under Article 78 of the Civil Practice Law and Rules. When a denial is based upon one of the exceptions to rights of access that were discussed earlier, the agency has the burden of proving that the record sought falls within one or more of the exceptions (section 89(4)(b)).

A new provision in the Freedom of Information Law permits a court, in its discretion, to award reasonable attorney's fees when a person challenging a denial of access to records in court substantially prevails. To award attorney's fees, a court must find

that the record was of "clearly significant interest to the general public" and that the agency "lacked a reasonable basis at law for withholding the record." While a court may award attorney's fees, such an award is not mandatory.

Public Notice

The regulations require that each agency post conspicuously and/or publicize in a local newspaper:

—locations where records are made available;

—the name, title, business address and telephone number of the records access officer; and

—the right to appeal a denial of access and the name and business address of the person or body to whom appeals should be directed.

Access to Records of the State Legislature

Section 88 of the Freedom of Information Law applies only to the State Legislature and provides access to the following records in its possession:

(a) bills, fiscal notes, introducers' bill memoranda, resolutions and index records;

(b) messages received from the Governor or the other house of the Legislature, as well as home rule messages;

(c) legislative notification of the proposed adoption of rules by an agency;

(d) members' code of ethics statements;

(e) transcripts, minutes, journal records of public sessions, including meetings of committees, subcommittees and public hearings, as well as the records of attendance and any votes taken;

(f) audits and statistical or factual tabulations of, or with respect to, materials otherwise accessible pursuant to section 88 or any other provision of law;

(g) administrative staff manuals and instructions to staff that affect the public;

(h) final reports and formal opinions submitted to the Legislature;

(i) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the Legislature; and

(j) any other records made available by any other provision of law.

In addition, each house of the Legislature must maintain and make available:

(a) a record of votes of each member in each session, committee and subcommittee meeting in which the member votes;

(b) a payroll record setting forth the name, public office address, title and salary of every officer or employee; and

(c) a current list, reasonably detailed, by subject matter of any records required to be made available by section 88.

Each house is required to issue regulations pertaining to the procedural aspects of the law. Requests should be directed to the public information officers of the respective houses.

Access to Court Records

Although the courts are not subject to the Freedom of Information Law, section 255 of the Judiciary Law has long required the clerk of a court to "diligently search the files, papers, records and dockets in his office" and upon payment of a fee make copies of such items.

Agencies charged with the responsibility of administering the judicial branch are not courts and therefore are treated as agencies subject to the Freedom of Information Law.

Sample Request Letter

Records Access Officer
Name of Agency
Address of Agency
City, NY, zip code

Re: Freedom of Information
Law Request

Dear Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers

Law, I hereby request records or portions thereof pertaining to _____ (attempt to identify the records in which you are interested as clearly as possible).

If there are any fees for copying the records requested, please inform me before filling the request (or:...please supply the records without informing me if the fees are not in excess of $_____).

As you know, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,

Signature
Name
Address
City, State, zip code

Sample Appeal Letter

Name of Agency Official
Appeals Officer
Name of Agency
Address of Agency
City, NY, zip code

Re: Freedom of Information Law Appeal

Dear _____:

I hereby appeal the denial of access regarding my request, which was made on _____ (date) and sent to _____ (records access officer, name and address of agency).

The records that were denied include: _____ (enumerate the records that were denied).

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on ap-

peal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, 162 Washington Avenue, Albany, New York 12231.

Sincerely,

Signature
Name
Address
City, State, zip code

The Open Meetings Law

The Open Meetings or "Sunshine" Law went into effect in New York in 1977. Amendments that clarify and reaffirm your right to hear the deliberations of public bodies became effective on October 1, 1979.

In brief, the law gives the public the right to attend meetings of public bodies, listen to the debates and watch the decisionmaking process in action.

As stated in the legislative declaration in the Open Meetings Law (section 100): "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

What is a "Meeting"?

Although the definition of "meeting" was vague as it appeared in the original law, the amendments to the law clarify the definition in conjunction with expansive interpretations of the law given by the courts. "Meeting" is defined to mean "the official convening of a public body for the purpose of conducting public business." As such, any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened open to the public, whether or not there is an intent to take action, and regardless of the manner in which the gathering may be characterized.

Since the law applies to "official" meetings, chance meetings or social gatherings are not covered by the law.

Also, the law is silent with respect to public participation. Therefore, a public body may permit you to speak at open meetings, but is not required to do so.

What is Covered by the Law?

The law applies to all public bodies. "Public body" is defined to cover entities consisting of two or more people that conduct public business and perform a governmental function for the State, for an agency of the State, or for public corporations, including cities, counties, towns, villages and school districts, for example. In addition, committees and subcommittees are specifically included within the definition. Consequently, city councils, town boards, village boards of trustees, school boards, commissions, legislative bodies and committees and subcommittees of those groups all fall within the framework of the law.

Notice of Meetings

The law requires that notice of the time and place of all meetings be given prior to every meeting.

If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than 72 hours prior to the meeting. Notice to the public must be accomplished by posting in one or more designated public locations.

When a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Again, notice to the public must be given by means of posting.

When Can a Meeting be Closed?

The law provides for closed or "executive" sessions under circumstances prescribed in the law. It is important to emphasize that an executive session is not separate from an open meeting, but rather is defined as a portion of an open meeting during which the public may be excluded.

To close a meeting for executive session, the law requires that a public body take several procedural steps. First, a motion must be made during an open meeting to enter into executive session; second, the motion must identify "the general area or areas of the subject or subjects to be considered"; and third, the motion

must be carried by a majority vote of the total membership of a public body.

Further, a public body cannot close its doors to the public to discuss the subject of its choice, for the law specifies and limits the subject matter that may appropriately be discussed in executive session. The eight subjects that may be discussed behind closed doors include:

(a) matters which will imperil the public safety if disclosed;

(b) any matter which may disclose the identity of a law enforcement agency or informer;

(c) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

(d) discussions regarding proposed, pending or current litigation;

(e) collective negotiations pursuant to Article 14 of the Civil Service Law (the Taylor Law);

(f) the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;

(g) the preparation, grading or administration of examinations; and

(h) the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

These are the only subjects that may be discussed behind closed doors; all other deliberations must be conducted during open meetings.

It is important to point out that a public body can never vote to appropriate public monies during a closed session. Therefore, although most public bodies may vote during a properly convened executive session, any vote to expend public monies must be taken in public.

The law also states that an executive session can be attended by members of the public body and any other persons authorized by the public body.

After the Meeting — Minutes

If you cannot attend a meeting, you can still find out what actions were taken, because the Open Meetings Law requires that minutes of both open meetings and

executive sessions must be compiled and made available.

Minutes of an open meeting must consist of "a record or summary of all motions, proposals, resolutions and any matter formally voted upon and the vote thereon." Minutes of executive sessions must consist of "a record or summary of the final determination" of action that was taken, "and the date and vote thereon." Therefore, if, for example, a public body merely discusses a matter during executive session, but takes no action, minutes of an executive session need not be compiled. However, if action is taken, minutes of the action taken must be compiled and made available.

It is also important to point out that the Freedom of Information Law requires that a voting record must be compiled that identifies how individual members voted in every instance in which a vote is taken. Consequently, minutes that refer to a four to three vote must also indicate who voted in favor, and who voted against.

Enforcement of the Law

What can be done if a public body holds a secret meeting? What if a public body makes a decision during an executive session that should have been open?

Any "aggrieved" person can bring a lawsuit. Since the law says that meetings are open to the general public, you would be aggrieved if you feel that you have been improperly excluded from a meeting or if you believe that an executive session was held that should have been open.

Upon the judicial challenge, a court has the power to nullify action taken by a public body in violation of the law "upon good cause shown." In addition, a court also has the authority to award reasonable attorney fees to the successful party. This means that if you go to court and you win, a court may (but need not) reimburse you for your expenditure of legal fees.

It is noted that an unintentional failure to fully comply with the notice requirements "shall not alone be grounds for invalidating action taken at a meeting of a public body."

The Site of Meetings

As specified earlier, all meetings of a public body are open to the general public. Moreover, the law requires that public bodies make reasonable efforts to insure that meetings are held in facilities that permit "barrier free physical access" to physically handicapped persons.

Exemptions from the Law

The Open Meetings Law does not apply to:

(1) judicial or quasi-judicial proceedings, except proceedings of zoning boards of appeals;
(2) deliberations of political committees, conferences and caucuses; or
(3) matters made confidential by federal or state law.

Stated differently, the law does not apply to proceedings before a court or before a public body that acts in the capacity of a court, to political caucuses, or to discussions concerning matters that might be made confidential under other provisions of law. For example, federal law requires that records identifying students be kept confidential. As such, a discussion of records by a school board regarding a particular student would constitute a matter made confidential by federal law that would be exempt from the Open Meetings Law.